

NIPCAM Services Delmarva, LLC and Alejandro Sorcia and Juan Guzman. Cases 11–CA–061485 and 11–CA–063036

August 31, 2012

DECISION AND ORDER

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

The Acting General Counsel seeks a default judgment in this case on the ground that the Respondent has failed to file a legally sufficient answer to the complaint. Upon charges filed by Alejandro Sorcia in Case 11–CA–061485 and by Juan Guzman in Case 11–CA–063036,¹ the Acting General Counsel issued a consolidated complaint on February 29, 2012,² against NIPCAM Services Delmarva, LLC (the Respondent), alleging that it has violated Section 8(a)(1) of the Act by unlawfully interrogating employees about their protected concerted activities, threatening employees with discharge if they engaged in protected concerted activities, and discharging four employees for engaging in protected concerted activities.

On about March 14, the Respondent efiled an unsigned and undated document with the Board. On April 12, the Region advised the Respondent that this document did not meet the Board's requirements for an answer, and extended the time for filing an answer to April 19. The Region advised the Respondent that if an answer was not filed by that time, a motion for default judgment would be filed. In an email sent to the Region on April 22, the Respondent referred to the March 14 document as "a response to the NLRB as required."

On April 25, the Acting General Counsel filed a Motion for Default Judgment. On April 30, the Board issued an Order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Default Judgment

Section 102.20 of the Board's Rules and Regulations provides that the allegations in a complaint shall be deemed admitted if an answer is not filed within 14 days from service of the complaint, unless good cause is shown. In addition, the complaint affirmatively states that an answer must be received by the Regional Office

on or before March 14, and that if no answer is filed, the Board may find, pursuant to a motion for default judgment, that the allegations in the complaint are true. Further, the undisputed allegations in the Acting General Counsel's motion disclose that the Region, by certified letter dated April 12, notified the Respondent that unless the Respondent filed an answer by April 19, a motion for default judgment would be filed.

As described above, on March 14, the Respondent efiled an unsigned and undated document with the Region.³ This document states that "NIPCAM Services of Delmarva, LLC acknowledges the decision of the NLRB Board and will agree" to offer full employment to the four alleged discriminatees, "and they will earn the wages that are paid presently to employees that do similar or same work and with the same seniority as if they had been working for NIPCAM Services the whole time." The document further provides that the Respondent "agrees to give all employees a copy of the NOTICE." The document also agrees that the Respondent owes the discriminatees backpay "while they were unemployed since their dismissal," but disputes the amount of backpay owed.⁴ Finally, the document states that the Respondent "has witnesses that are willing to testify under oath to the effect that the above persons have been working all along."

On April 12, the Region advised the Respondent by letter that the March 14 document did not meet the requirements of the Board's Rules and Regulations as an answer to the complaint. In an email dated April 22, the Respondent stated that it had "filed a response to the NLRB as required."

In determining whether to grant a motion for default judgment on the basis of a respondent's failure to file a timely and sufficient answer, the Board typically shows some leniency toward respondents who, like the Respondent in this case, proceed without the benefit of counsel. See *LBE, Inc.*, 356 NLRB 542 (2011), *enfd.* summarily, Case 11-1326 (6th Cir. May 11, 2011); *A.P.S. Production/A. Pimental Steel*, 326 NLRB 1296, 1297 (1998). The Board has recognized, however, that a respondent's "lack of representation does not excuse it from its obligation to file an appropriate answer to the complaint." *LBE*, *supra* at 543 (citing *Newark Symphony Hall*, 323 NLRB 1297 (1997)). Generally, to get a determination on the merits, a pro se respondent must file a timely answer that can reasonably be construed as deny-

¹ The charge in Case 11–CA–061485 was filed on July 20, 2011, and amended on September 1, October 14, and December 2, 2011. The charge in Case 11–CA–063036 was filed on August 22, 2011, and amended on September 14 and December 8, 2011.

² All dates herein are 2012, unless otherwise noted.

³ Although unsigned, the document bears the name of Alvaro Vilaveces, the Respondent's owner.

⁴ As neither the complaint nor the Motion for Default Judgment mentions any backpay figures, the Respondent apparently refers to matters raised in discussions with the Region.

ing the substance of the complaint allegations, or must provide a “good cause” explanation for failing to do so. See *Clearwater Sprinkler System*, 340 NLRB 435, 435 (2003).

Here, the Respondent’s March 14 document cannot reasonably be construed as denying the substance of the complaint’s factual allegations; to the contrary, the document appears to admit liability. The document agrees to various remedies, without any discussion of the facts of the case. The Respondent does appear to contend—both in the March 14 document and its April 22 email—that the discharged employees immediately found interim work, thus reducing any backpay owed them. That issue, however, is not before the Board. Should the Respondent wish to dispute the amount of backpay owed, it will have the opportunity to do so during the compliance phase of this case.

In the absence of good cause being shown for the lack of a timely and sufficient answer, we grant the Acting General Counsel’s Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent, a sole proprietorship with an office and place of business in Watkinsville, Georgia, has been engaged in providing pest control and chicken catching services to various business entities. During the calendar year ending December 31, 2011, a representative period, the Respondent, in conducting its business operations described above, provided services valued in excess of \$50,000 directly to businesses located outside the State of Georgia, including Amick Farms, which has a facility located in Saluda, South Carolina.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Alvaro Villaveces	Owner
Trinidad Leyva Jimenez	Supervisor
Luis Sanchez	Crew Leader
Alejandro Sorcia	Crew Leader

Beginning about June 12, 2011, the Respondent’s employees engaged in concerted activities with each other

for the purposes of mutual aid and protection by discussing their wages and other terms and conditions of employment.

On about June 27, 2011, the Respondent’s employees engaged in concerted activities with each other for the purposes of mutual aid and protection by engaging in a strike to protest matters related to their wages and other terms and conditions of employment.

On about June 24, 26, and 27, 2011, the Respondent, by Leyva Jimenez, interrogated employees about their protected concerted activities and the protected concerted activities of other employees.

On about June 24, 2011, the Respondent, by Leyva Jimenez, threatened its employees with discharge if they engaged in protected concerted activities.

On about June 28, 2011, the Respondent discharged its employee Iram San Miguel Reyes.

On about June 30, 2011, the Respondent discharged its employees Juan Guzman Guzman and Miguel Angel Vazquez Cora.

On about July 3, 2011, the Respondent discharged its employee Cristobal Molina.

The Respondent engaged in the conduct described above because the Respondent’s employees engaged in concerted activities with other employees for the purposes of mutual aid and protection and to discourage employees from engaging in these or other protected concerted activities.

CONCLUSION OF LAW

By the conduct described above, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent has violated Section 8(a)(1) of the Act by discharging employees Iram San Miguel Reyes, Juan Guzman Guzman, Miguel Angel Cora, and Cristobal Molina, we shall order the Respondent to offer them full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

Further, we shall order the Respondent to make Iram San Miguel Reyes, Juan Guzman Guzman, Miguel Angel

Cora, and Cristobal Molina whole for any loss of earnings or other benefits suffered as a result of the Respondent's unlawful actions against them. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).⁵

The Respondent shall also be required to remove from its files any and all references to the unlawful discharges of Iram San Miguel Reyes, Juan Guzman Guzman, Miguel Angel Cora, and Cristobal Molina, and to notify them in writing that this has been done and that the unlawful references will not be used against them in any way.

In addition to our usual notice posting remedy, we shall require mailing of the notice because many of the Respondent's employees do not have regular access to an area for posting notices to employees.⁶ See *Technology Service Solutions*, 334 NLRB 116 (2001) (requiring employer to mail notices to employees who did not regularly report to one of its facilities). Specifically, we shall order the Respondent to mail copies of the notice to all current and former employees employed by the Respondent since June 24, 2011. We shall further require that the notice be posted and sent to employees in both English and Spanish.

ORDER

The National Labor Relations Board orders that the Respondent, NIPCAM Services of Delmarva, LLC, Watkinsville, Georgia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

⁵ In the complaint, the Acting General Counsel seeks an order requiring reimbursement of amounts equal to the difference in taxes owed upon receipt of a lump-sum payment and taxes that would have been owed had there been no discrimination. Further, the Acting General Counsel requests that the Respondent be required to submit the appropriate documentation to the Social Security Administration so that when backpay is paid, it will be allocated to the appropriate periods. Because the relief sought would involve a change in Board law, we believe that the appropriateness of these proposed remedies should be resolved after full briefing by the affected parties, and there has been no such briefing in this case. Accordingly, we decline to order this relief at this time. See, e.g., *Ishikawa Gasket America, Inc.*, 337 NLRB 175, 176 (2001), enf'd. 354 F.3d 534 (6th Cir. 2004), and cases cited therein.

⁶ The Respondent's chicken catchers are picked up at their homes and taken to various farms to perform their work. For that reason, and because the Respondent apparently does not maintain an area designed for posting notices to employees, the Acting General Counsel has not specifically requested an order requiring physical posting of the notice. We find, however, that ordering physical posting of the notice, to the extent such posting is possible, will effectuate the purposes of the Act.

(a) Coercively interrogating employees about their protected concerted activities.

(b) Threatening employees with discharge if they engage in protected concerted activities.

(c) Discharging employees because they engage in protected concerted activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Iram San Miguel Reyes, Juan Guzman Guzman, Miguel Angel Cora, and Cristobal Molina full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

(b) Make Iram San Miguel Reyes, Juan Guzman Guzman, Miguel Angel Cora, and Cristobal Molina whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of this Order, remove from its files any and all references to the unlawful discharges of Iram San Miguel Reyes, Juan Guzman Guzman, Miguel Angel Cora, and Cristobal Molina, and within 3 days thereafter notify them in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its Watkinsville, Georgia facilities copies of the attached notice marked "Appendix."⁷ Copies of the notice in English and Spanish, on forms provided by the Regional Director for Region 11, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to

⁷ If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means.⁸ Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition, within 14 days after service by the Region, the Respondent shall duplicate and mail, at its own expense, copies of the notice to all current employees and former employees employed by the Respondent at any time since June 24, 2011. Copies of the notice in English and Spanish, signed by the Respondent's authorized representative, shall be mailed to the last known address of each of these employees.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

⁸ For the reasons stated in his dissenting opinion in *J. Picini Flooring*, 356 NLRB 11 (2010), Member Hayes would not require electronic distribution of the notice.

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your protected concerted activities.

WE WILL NOT threaten you with discharge if you engage in protected concerted activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Iram San Miguel Reyes, Juan Guzman Guzman, Miguel Angel Cora, and Cristobal Molina full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Iram San Miguel Reyes, Juan Guzman Guzman, Miguel Angel Cora, and Cristobal Molina whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful discharges of Iram San Miguel Reyes, Juan Guzman Guzman, Miguel Angel Cora, and Cristobal Molina, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges will not be used against them in any way.

NIPCAM SERVICES DELMARVA, LLC